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June 10, 2009



The Honorable Anne Quinlan, Acting Secretary
Surface Transportation Board
395 E. Street, SW
Washington, DC 20423-0001

Re: Allegheny Valley Railroad Company – Petition for Declaratory Order
STB Finance Docket No. 35239

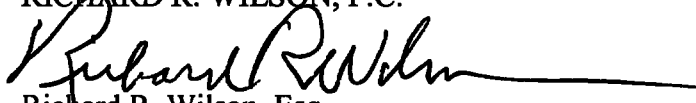
Dear Acting Secretary Quinlan:

Enclosed for filing is an original and ten copies of the Allegheny Valley Railroad Company's Rebuttal to the Reply of The Buncher Company filed in response to Allegheny Valley Railroad Company's Petition for Declaratory Order. Please time and date stamp the extra copy of this letter and return it to us in the enclosed self addressed, stamped envelope provided for that purpose.

If you have any further questions in this regard, please contact the undersigned.

Very truly yours,

RICHARD R. WILSON, P.C.


Richard R. Wilson, Esq.
Attorney for Allegheny Valley Railroad Company

RRW/bab
Enclosure

xc: Allegheny Valley Railroad Company
All Parties of Record

ENTERED
Office of Proceedings
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Public Record

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 35329

ALLEGHENY VALLEY RAILROAD COMPANY-
PETITION FOR DECLARATORY ORDER

ALLEGHENY VALLEY RAILROAD COMPANY'S REBUTTAL
TO THE REPLY OF THE BUNCHER COMPANY

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Dated: June 11, 2009



Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 35239

ALLEGHENY VALLEY RAILROAD COMPANY-
PETITION FOR DECLARATORY ORDER

ALLEGHENY VALLEY RAILROAD COMPANY'S REBUTTAL
TO THE REPLY OF THE BUNCHER COMPANY

Pursuant to 49 C.F.R. §1112.2 and the decision of the Surface Transportation Board served in this proceeding on May 13, 2009, Allegheny Valley Railroad Company ("AVRR") files this Rebuttal to the Reply of The Buncher Company ("Buncher") submitted in response to AVRR's Petition for Declaratory Order.

I. SUMMARY OF REBUTTAL

In its Reply, Buncher has produced the Conrail Northeast Rail Service Act ("NERSA") abandonment application and the ICC Certificate and Decision served May 18, 1984 in ICC Docket No. AB-167(Sub. No. 558N), Conrail Abandonment in Allegheny County, PA. These documents establish that Conrail sought ICC abandonment authority for the western most section of the Valley Industrial Track including the trackage and right of way along Smallman Street between 11th Street and 21st Street in the Pittsburgh Strip District (referred to as the Allegheny Secondary). The track and right of way abandoned by Conrail in 1984 in AB-167 (Sub. No. 558N) did not include the permanent rail easement retained by Conrail in 1983 comprising that portion of the Valley Industrial Track (the former Allegheny Branch) between 16th and 21st Streets (Track 8) extending from Railroad Street. As asserted by AVRR in its Petition for

Declaratory Order, no abandonment application has been filed by Conrail or AVRR for the segment of the Valley Industrial Track which includes the permanent rail easement between 16th and 21st Streets.

Moreover, even if the Board were to construe the authority granted to Conrail in AB-167 (Sub. No. 558N) as encompassing the permanent rail easement between 16th and 21st Streets extending from Railroad Street (on the north side of the Pittsburgh Fruit Auction and Sales Building), the evidence in this proceeding establishes that the STB would retain jurisdiction over this disputed right of way and that Conrail would not have consummated any I.C.C. abandonment authorization for the permanent rail easement.

As acknowledged by Buncher in its Reply, the ICC Abandonment Authorization Certificate and Decision of May 18, 1984 imposed only one requirement on Conrail:

If the authority granted by this Certificate and Decision is exercised, Conrail shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

As further acknowledged by Buncher in its Reply, no letter was found in the ICC's abandonment docket file indicating that Conrail exercised the abandonment authorization with respect to the permanent rail easement between 16th and 21st Streets.

Since there is no evidence that Conrail complied with the only condition imposed by the Board in AB-167 (Sub-No. 558N), there is no definitive confirmation as to whether Conrail consummated the ICC abandonment authorization with respect to its easement between 16th and 21st Streets in the Pittsburgh Strip District. The Board therefore retains jurisdiction to decide if this line segment has been abandoned pursuant to the conditions imposed by the ICC's May 18, 1984 Order. Baros v. Texas Mexican

Railroad Co., 400 F.3d 288 (5th Cir. 2005) distinguishing Lucas v. Township of Bethel, 319 F.3d 595 (3d Cir. 2003) as pertaining to unconditioned abandonments.

The evidence submitted by AVRR in its Petition for Declaratory Order and this Rebuttal does not establish who removed Track 8 from the right of way between 16th and 21st Streets and even if Conrail did so, that would not establish abandonment consummation. Neither Conrail nor AVRR have done any act which unequivocally renders the rail easement impossible to use for future railroad purposes. Neither Conrail nor AVRR removed the Pittsburgh Produce Terminal station from the Open and Prepay Station List Tariff nor did they seek PaPUC crossing abolition approval for the 21st Street crossing. Conrail conveyed its 1983 permanent rail easement right of way from 16th to 21st Streets to AVRR in 1995 for continued railroad use and AVRR, at the behest of various public agencies, seeks to reestablish rail service over this right of way as described in its Petition for Declaratory Order. Even if one assumes that AB167 (Sub. No. 588N) can be construed to include the permanent rail easement, which is part of the former Allegheny Branch, and not the Allegheny Secondary, these facts clearly establish that the STB would retain jurisdiction to determine that Conrail did not consummate any abandonment authority with respect to the permanent easement between 16th and 21st Streets and that it retained its easement for future common carrier rail service.

Before the
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO: 35239
ALLEGHENY VALLEY RAILROAD COMPANY -
PETITION FOR DECLARATORY ORDER

II. VERIFIED STATEMENT OF RUSSELL A. PETERSON IN
REBUTTAL TO THE REPLY OF THE BUNCHER COMPANY

My name is Russell A. Peterson and I am Chief Executive Officer of Allegheny Valley Railroad Company, ("AVRR") 519 Cedar Way, Bldg. 1, Ste. 100, Oakmont, PA 15139. This is my Rebuttal Statement to the Reply of the Buncher Company ("Buncher") submitted in response to AVRR's Petition for Declaratory Order.

In its Reply, Buncher furnishes a map which shows as Exhibit A the historical location of various tracks in the Pittsburgh Produce Terminal. The circa-1923 map, however, is not helpful to the Board in locating the Valley Industrial Track (Track No. 8) because the 1923 layout predates the 1926 construction of a new greatly enlarged freight and produce terminal stretching along the Allegheny River from 11th to 24th Streets which survived, more or less, into the period relevant to AVRR's Petition for Declaratory Order and Buncher's Reply.

In its reply, Buncher chronicles Pittsburgh Produce Terminal land sales and/or abandonment proceedings. AVRR takes no exception to the consummation of the 1972 Penn Central Transportation Company abandonment of the Allegheny Branch between 12th and 14th Streets. AVRR takes no exception to the 1978 sale by Penn Central Corporation to Buncher of Produce Yard "B" and Produce Storage Yard "D" between

16th and 21st Streets located northwest of the subject Permanent Easement. AVRR takes no exception to the consummation of the 1984 abandonment of the Fort Wayne Connecting Track on the lower deck of the Fort Wayne Bridge to its connection with the Smallman Street track (former Allegheny Secondary) of the Valley Industrial Track. AVRR takes no exception to the 1983 sale by Conrail to the Urban Redevelopment Authority of that portion of the Pittsburgh Produce Terminal between 16th and 21st Streets located southeast of the subject Permanent Easement.

AVRR takes no exception to the 1984 ICC authorization for Conrail to abandon the Valley Industrial Track from its connection with the Fort Wayne Connecting Track to the north side of 21st Street because there were two separate routes through the Pittsburgh Produce Terminal that extended to the north side of 21st Street. The Valley Industrial Track from the Fort Wayne Connecting Track at MP 0.0 *along Smallman Street to MP 0.66 at 21st Street (former Allegheny Secondary) and the Valley Industrial Track from MP 0.0 *through the Produce Terminal Yard to MP 0.6 at Railroad Street and 21st Street (former Allegheny Branch and the original mainline of the PRR Conemaugh Subdivision)*. In Exhibit F of its Reply, Buncher presents Conrail's Application for Abandonment, which in its Exhibit B LOCATION AND MAP identifies the Smallman Street (Allegheny Secondary) route, not the Railroad Street route¹ as the line for which abandonment authority was sought. In February of 1983, Conrail reactivated its Brilliant*

¹ Exhibit B to Conrail's 1984 Abandonment Application confirms that Conrail did not seek ICC abandonment authority for the permanent rail easement. It depicts the Allegheny Branch trackage extending from the 31st Street Bridge south along the east bank of the Allegheny River to an end point at approximately 0.6. Conrail's retained permanent easement continues from 0.6 (21st Street) to the 16th Street Bridge (See Exhibit D – yellow highlight) This trackage and the permanent rail easement are not part of the trackage for which Conrail sought abandonment authorization in AB-167 (Sub. NO. 585N) which is identified by the cross hatched tape (highlighted in orange) for the Ft. Wayne Connecting Track (M P 0 8 to 0.0) and Valley Industrial (former Allegheny Secondary M.P. 0.0 to 0 66) along Smallman Street.

Branch connection between the Pittsburgh Mainline and the Allegheny Branch at MP 6.81 (north of the Strip District), which allowed service to the Allegheny Branch via the upper deck of the Fort Wayne Bridge and the Pittsburgh main line. Thereafter, service to the Pittsburgh Produce Terminal was from the north along the Allegheny Branch main line (a.k.a. Valley Industrial Track) onto Track 8 and the Permanent Rail Easement. The lower deck of the Fort Wayne Bridge, the Fort Wayne Connecting Track, and the Valley Industrial Track along Smallman Street to 21st Street were abandoned in 1984 and were no longer used by Conrail to serve the Strip District². Accordingly, AVRR takes strong exception to any assertion by Buncher in its Reply that the 1984 abandonment pertains to the Permanent Easement which was retained by Conrail to preserve its rail access into the Produce Terminal area after the Smallman Street line was abandoned.

However, even if the 1984 abandonment proceeding were to be construed to encompass the Permanent Rail Easement, it is clear that Conrail never consummated the abandonment with respect to the easement. As the principal investor and direct

² Chronology of Allegheny Branch Service Routes

1900-1972. Train service on Valley Industrial Track was via the lower deck of the Fort Wayne Bridge to its connection with the Allegheny Branch at MP 0.0, through the Pittsburgh Produce Terminal, along Railroad Street, and along Allegheny River to New Kensington, PA and eventually Buffalo NY.

1972-1983 In 1972 the Pittsburgh Produce Terminal real estate south of 16th Street was transferred to the Penn Central Trustees. Train service was rerouted from the lower deck of the Fort Wayne Bridge to the Allegheny Secondary at MP 0.0, along Smallman Street (as an overhead route) to the Allegheny Branch at 29th Street and then on the Allegheny Branch back along Railroad Street into the Pittsburgh Produce Terminal

1983-Present: The Brilliant Branch between the Pittsburgh East main line and the Allegheny Branch was reactivated February 1983. Train service was rerouted via the upper deck of the Fort Wayne Bridge to the Pittsburgh East main line, to the Brilliant Branch, to the Allegheny Branch at MP 6.81, and then along the Allegheny Branch via Railroad Street into the Pittsburgh Produce Terminal over the Permanent Rail Easement

1984: Conrail applied to abandon the lower deck of Fort Wayne Bridge, the Fort Wayne connecting Track, the Allegheny Secondary (a.k.a. Valley Industrial Track) via Smallman Street from MP 0.0 to MP 0.66, a "Former Overhead Route"

negotiator with Conrail for the 1995 AVRR acquisition of the Valley Industrial Track, Conrail clearly affirmed to me its continued long-term interest to reserve the Permanent Easement for future rail use. During our negotiations Conrail also made me aware of the 1983 conveyance to Buncher and of the existence of Buncher's general interest in real estate development in the Strip District. Like Conrail, AVRR recognized that future development in the Strip District could hold potential for rail service, and that has proved to be the case.

In its Reply, Buncher states that it believes that Conrail may have retained this easement over the property because it thought at the time that Buncher might want to receive rail service at that location. In its 1983 quitclaim deed to Buncher, however, Conrail reveals a much longer-term view of protecting future common carrier rail service into the former Produce Yard area as well as reserving at page 3 of the 1983 deed the permanent right to build a ramp down into a tunnel (presumably for passenger transportation into downtown Pittsburgh) or a ramp up onto an overhead bridge (presumably to connect with the currently active Pittsburgh main line on the top deck of the Fort Wayne Bridge); more specifically as follows:

“THIS INSTRUMENT is executed, delivered and accepted upon the understanding and agreement: (2) that in the event the tracks of the railroad of Grantor are elevated or depressed...”

In its Reply, Buncher states that at some point between Conrail's receipt of abandonment authority in 1984 and 1988, all of the trackage of the former Valley Industrial Track was removed and the entire area was filled, graded, and otherwise prepared for non-railroad use. In 39 years of railroading, I have never seen a Class I railroad fill, grade, and otherwise prepare an entire area for non-railroad use. AVRR

takes no exception to Buncher's removal of Tracks 6 and 7 within the Permanent Easement; however, AVRR observes that Buncher was careful not to state that *Conrail* removed Track 8 within the Permanent Easement. Unfortunately, it is a common land-owner misconception that an STB abandonment authority order is all that is needed to effectuate abandonment when a notice of consummation of abandonment is the definitive document needed to effectuate abandonment authority.

In its Reply, Buncher points out that AVRR has not operated over any portion of the Valley Industrial Track between MP 0.3 (16th Street) and MP 0.6 (21st Street) because there has been no trackage there for more than 20 years. AVRR views the seven-year period of discontinued Conrail use as a nominal period of time compared with the time it has taken to develop and implement commuter rail on the Valley Industrial Track and the proposed station link with the Pittsburgh Port Authority light rail system. Eleven years of commuter rail planning and development have occurred during AVRR's interest in the Permanent Easement. AVRR has always considered it immaterial as to whether Track 8 was actually there or not because any contemplated use, whether for freight or for passenger, would require renewal of that track as provided for in the Permanent Easement.

With regard to freight operations, as soon as AVRR commenced service in the Strip District, it recognized the need for a run-around track that did not occupy multiple city street grade crossings (most of which are only 240' feet apart). The need for run around tracks between 16th Street and 21st Street became even more critical when it became state law for AVRR to not block grade crossings for more than five minutes. AVRR, however, decided to wait and see what commuter train track configuration would

be required before making a capital investment in track renewal over the Permanent Easement.

With regard to passenger operations, AVRR promptly realized the Valley Industrial Track was a valuable asset for passenger transportation. In March of 1998, I testified before a Pennsylvania Transportation Improvement Plan public hearing and formally made the Valley Industrial Track available to the public for passenger transportation. In September of 1998, a passenger train was operated for approximately 300 state and local officials, planning officials and organizations, chambers of commerce, media, and other interested parties from New Kensington to 21st Street, where a stop was made for the public to disembark and view the unobstructed Permanent Easement from 21st Street.

In 1999, the Pennsylvania Department of Transportation (Penn DOT), City of Pittsburgh, Allegheny and Westmoreland Counties, the Southwest Pennsylvania Planning Commission, the Pittsburgh Port Authority, Michael Baker Engineers, and AVRR participated in a Penn DOT feasibility study of commuter rail on AVRR. The study found no fatal flaws. Later, the Pittsburgh Port Authority, through its engineering consultant DMJM Harris studied all of the options for the Eastern Corridor (Allegheny Valley) and found AVRR commuter rail (vs. electrified light rail) a viable option. The third study, conducted by HDR, Inc. engineers, further quantified the cost and expense of upgrading the railroad and building related passenger facilities connections and further quantified ridership projections. The third study recommends proceeding with the Allegheny Valley commuter rail.

In fact, Pittsburgh Port Authority concurrently planned and received Federal Transit Authority ("FTA") approval to make an underground light rail extension into the Strip District as part of its FTA-authorized and funded \$400 million light rail extension from downtown under the Allegheny River to the north side. Approximately 65% of final design has been done on the proposed link with the Eastern Corridor. Commencing with AVRR's 1998 public testimony, the Permanent Easement has been under active consideration and development for commuter rail.

In its reply, Buncher contends that the commuter rail proposal has failed to attract public support for various reasons. However, as recently as May 26, 2009, Commonwealth of Pennsylvania Secretary of Transportation Allen Biehler, before the House Democrat Policy Committee, said "Allegheny Valley Railroad is a top priority of the State". (Emphasis added) See Exhibit A. "Allegheny County Executive Dan Onorato also has asked for \$10.5 million for final design (Emphasis added) of a commuter rail line from Arnold in Westmoreland County to the Strip District or Downtown. The commuter rail line, which has been discussed and studied for at least a decade, would operate along the Allegheny Valley Railroad, a little-used freight line. It would have four peak-period trips per day and serve six or seven stations." "Mr. Altmire secured \$500,000 in 2007 for a feasibility study that is nearly completed, and he called the project one of his top transportation priorities. (Emphasis added) It would give commuters an alternative to driving on congested Route 28." See Exhibit B.

In its reply, Buncher states that the proposed service would not provide direct access into town. To the contrary, "U.S. Congressman Jason Altmire presented officials from the Allegheny County Economic Development with \$500,000 that he secured in the

FY 2008 federal budget for a study that will lay the groundwork for the Allegheny Valley Commuter Rail. The transit project will provide passenger rail service to connect residents of Westmoreland County and the Allegheny-Kiski Valley with downtown Pittsburgh, and eventually the Pittsburgh International Airport." (Emphasis added) See Exhibit C.

In its reply, Buncher states the commuter rail service would terminate in the Strip District. However, the Permanent Rail Easement reserves the right to depress the tracks, which would provide for the construction of a downtown underground station link with the Pittsburgh Port Authority light rail system.

In its reply, Buncher states such passengers have no right to trespass on Buncher's surrounding property. Passengers need not trespass on Buncher's property because Buncher's property does not surround the Permanent Easement. Even if the AVRR commuter service were to terminate in the Strip, the Permanent Easement is wide enough for passenger terminal trackage and station platforms. The station platforms would be located on the southeast side of the tracks and would be adjacent to Urban Redevelopment property, not Buncher property. Moreover, additional public access could be located at 21st Street, 16th Street, and directly under the Permanent Easement by escalator or other people mover to the proposed light rail station.

In its Reply, Buncher says it is not evident how passenger service on the south side of the Allegheny River would alleviate traffic congestion resulting from the temporary rehabilitation of State Route 28, which is on the opposite side of the river and serves different communities. AVRR would first point out that AVRR is on the same side of the Allegheny River as Downtown Pittsburgh. The temporary period of

rehabilitation is, by Penn DOT's schedule, a period of *ten (10) years*. Only one expressway serves the Allegheny River Valley, and that is Route 28. Residents on both sides of the river use Route 28 to commute to and from downtown Pittsburgh. It does not matter which side of the river one resides on, Route 28 is the only high speed expressway into downtown Pittsburgh. The forthcoming traffic jams on both sides of the river will be colossal.

For example, effective this week and lasting into October of this year, Route 28 northbound is closed to all traffic between the 62nd Street Bridge and the Highland Park Bridge. All traffic is being detoured to Butler Street, a local street, on the AVRR side of the river. The commute into and out of downtown Pittsburgh in the Allegheny River Valley is currently a nightmare. A start-up of the commuter rail system during the "temporary" highway reconstruction and resulting stressful congestion would attract riders to mass transit that might otherwise continue to be automobile commuters. Once trying commuter rail, if the experience of many other cities holds true, the converts will stay on rail.

Lastly, Buncher notes that the proposed service would require capital funding of approximately \$258 million in 2003 dollars and ongoing operating and maintenance funding that is not available today. According to Congressman Altmire "The project is estimated to cost \$131 million (Emphasis added) and will average 1,900 riders each weekday." See Exhibit C. Urban Innovations, a transit-oriented development consultant, has identified fourteen (14) sources of funding. The project is being developed as a public-private partnership under guidelines established by the FTA. Funds for ongoing operations and maintenance flow from concurrent transit-oriented and economic

development projects along the corridor and Park & Rides, which are also planned as public-private partnerships.

Finally, in the 20 years of discontinued rail operations on the Permanent Easement, there has been no real estate development on or adjacent to the Permanent Easement by Buncher.

Russell Peterson

From: Tracy Wingenroth [tracy@pa-erg.com]
Sent: Wednesday, May 27, 2009 4:27 PM
To: Russell Peterson
Subject: This IS positive

Russ,

Attached is summary of the House Democrat Policy Committee hearing with PennDOT and the Turnpike yesterday. Secretary Biehler said "Allegheny Valley Railroad is a top priority of the state". Awesome!!!

"Rep. Dermody asked a question about the Allegheny Valley Railroad and stated that there is not time for another study to be done. He commented that it is important to make decisions now, in order to use money available from the stimulus package. The secretary agreed with Rep. Dermody, and said that the Allegheny Valley Railroad is a top priority of the state."

Members in attendance included Chairman Mike Sturla (D-Lancaster), Transportation Committee Chairman Joe Markosek (D-Allegheny), and Representatives Nick Kotik (D-Allegheny), Dante Santoni (D-Berks), Chris Sainato (D-Lawrence), Jaret Gibbons (D-Lawrence), Tim Seip (D-Schuylkill), Lawrence Curry (D-Montgomery), Bryan Barbin (D-Cambria), Neal Goodman (D-Schuylkill), Robert Donatucci (D-Philadelphia), Brendan Boyle (D-Philadelphia), and Ron Waters (D-Philadelphia).

PennDOT Secretary Allen Biehler offered the committee an overview of PennDOT's operations and recent work. He said PennDOT plans improvements to reduce congestion and maintenance issues, and measures roads for smoothness every two years. He noted the department classifies the Commonwealth's roads into four categories: Interstate highways, state highways, local roads carrying more than 2,000 cars a day, and local roads carrying less than that number. Secretary Biehler provided an overview of PennDOT's plans for road and bridge improvements, and its expected use of federal stimulus money. With respect to the thousands of miles of local roads throughout Pennsylvania in need of maintenance, the secretary commented, "Local needs are every bit as great as state needs."

Rep. Goodman, referring to Secretary Biehler's early remarks about specific projects that the stimulus package will fund, asked the secretary which projects the Pennsylvania Department of Transportation (PennDOT) plans to undertake. Secretary Biehler pointed Rep. Goodman to the PennDOT website, and explained that the projects are listed within the site. Secretary Biehler also stated that PennDOT continually updates the website with the progress and implementation of new projects. Rep. Goodman continued, commenting that rural municipalities along the Interstate 80 (I-80) corridor will continue to receive money from Act 44. Secretary Biehler confirmed Goodman's assumption by assuring him that Act 44 allows "everyone to get their fair share."

Rep. Kotik asked Secretary Biehler if Western Pennsylvania is working in cooperation with the federal government to improve railway infrastructure. Secretary Biehler responded by saying that PennDOT is continually engaged in conversation with the federal government in regards to rail/freight and rail/passenger programs. Secretary Biehler commented that it is important to look at Pennsylvania railway infrastructure in a national and global scope. He also mentioned that Pennsylvania has been in close contact with neighboring states to help in the implementation of railway plans. Rep. Kotik also asked about local municipalities and their tendency to use the liquid fuel reimbursements to pay maintenance workers and improve the physical condition of the municipality headquarters instead of using that money towards road repairs. Secretary Biehler responded by commenting that paying workers and, for instance, buying new computers, indirectly helps these road repairs.



post-gazette**NOW** NEWS / TRANSPORTATION
Pittsburgh Post-Gazette

Onorato eyes rail links to airport, Oakland

Seeking \$7 million in federal funding for mass transit system

Wednesday, April 29, 2009

By Jon Schmitz, Pittsburgh Post-Gazette

Allegheny County Executive Dan Onorato is seeking \$7 million in federal funding to begin development of a multibillion-dollar mass transit system linking Pittsburgh International Airport, Downtown, Oakland and several East End neighborhoods.

He also has asked for \$10.5 million for final design of a commuter rail line from Arnold in Westmoreland County to the Strip District or Downtown.

Mr. Onorato made those and other funding requests in a letter Friday to U.S. Reps. Jason Altmire, D-McCandless, and Mike Doyle, D-Forest Hills.

Congress has begun work on a new multiyear surface transportation funding authorization bill to replace the one that expires Sept. 30.

Mr. Onorato is hoping to capitalize on that, and on an administration that has signaled its intention to increase federal investment in rail and mass transit projects.

"As you know, President Obama wants to transform the way we travel in America -- both between cities and within cities -- in order to reduce dependence on foreign oil, lower carbon emissions, foster new economic development and give travelers and commuters more choices," he said in his letter to the lawmakers.

In an interview, Mr. Onorato said it was too soon to attach a timetable to his plans, but said it was important to have a blueprint of the region's priorities in the hands of federal officials.

"There's been a sea change of philosophy in Washington. We now have an administration that says we're reinvesting in this country. The new administration has definitely changed the discussion from wishful thinking to having a partner willing to invest and fund these projects," he said.

A rail line to the airport could originate at the end of the Port Authority's North Shore Connector, currently under construction, cross the Ohio River at Brunots Island and serve McKees Rocks, Stowe, Coraopolis and Moon, including Robert Morris University, said Kevin Evanto, Mr. Onorato's spokesman.

The Downtown-to-Oakland line could originate at the existing First Avenue light-rail station and use the corridor occupied by the Eliza Furnace Trail to reach Oakland. Or it could begin at Penn Station and follow the Martin Luther King Jr. East Busway.

On either route, much of the right-of-way already is publicly owned, Mr. Onorato said.

He envisions the Downtown-to-Oakland line connecting to a circulator system -- possibly using technology similar to West Virginia University's Personal Rapid Transit system -- serving the Pittsburgh Technology Center, Oakland, Shadyside, Bloomfield, Lawrenceville and the South Side.

The estimated development cost of the rail segments and circulator is \$3.5 billion. Mr. Onorato said he wants to explore public-private partnerships to help finance the project -- perhaps having a private investor design, build and operate the circulator line and control development rights along it.

"I'm very open-minded. We're putting everything on the table as far as funding these projects," he said.

Siemens Answers
 Products and Solutions designed to help
 The \$7 million Mr. Onorato is seeking would be used for preliminary planning, selection of routes and modes, and
 exploration of public-private financing.

The commuter rail line, which has been discussed and studied for at least a decade, would operate along the Allegheny Valley Railroad, a little-used freight line. It would have four peak-period trips per day and serve six or seven stations.

Mr. Altmire secured \$500,000 in 2007 for a feasibility study that is nearly completed, and he has called the project one of his top transportation priorities. It would give commuters an alternative to driving on congested Route 28.

Mr. Onorato asked the congressmen to earmark funds for seven other projects: \$25 million to rebuild and widen Campbells Run Road from Baldwin Road to Route 60 in Robinson; \$32 million to realign and widen Painters Run Road from Robb Hollow Road to Bower Hill Road in Upper St. Clair and Scott; \$35 million to rehabilitate the Mansfield Bridge, which connects Dravosburg, Glassport and McKeesport.

Also, \$12 million for a flyover ramp crossing railroad tracks at the Carrie Furnace redevelopment site in Rankin and Swissvale; \$4.5 million for road improvements near the Tech 21 office park in Marshall; \$2.5 million for road construction near Tech One Business Park in Monroeville; and \$7 million for traffic improvements at the Allegheny Ludlum steel plant in Brackenridge.

"I represent a district that has enormous transportation needs and I'm going to have to make difficult decisions," said Mr. Altmire, the only local congressman serving on the House Transportation and Infrastructure Committee, which is writing the funding authorization bill.

The bill will have a requirement that all projects have 80 percent of their funding secured, to discourage members from steering money to projects that have little chance of being built.

Mr. Altmire said it was possible that the rail projects, if not included in that bill, could be funded from other sources, noting that the Obama administration already has committed or proposed \$13 billion for high-speed intercity rail projects.

"There is definitely a new priority placed on rail projects and we hope this will fit into that somewhere," he said.

In a statement released yesterday afternoon, Mr. Doyle said: "I have received a number of requests from different local sources, including Allegheny County Executive Onorato. I greatly appreciate this input, and I'm working with local community leaders to work out the best way to proceed on the upcoming transportation bill."

Jon Schmitz can be reached at schmitz@post-gazette.com or 412-263-1868.

First published on April 28, 2009 at 12:00 pm

Altmire Meets with Local Officials to Advance Allegheny Valley Commuter Rail

(Oakmont, PA) – Today, U.S. Congressman Jason Altmire (PA-04) presented officials from the Allegheny County Economic Development with \$500,000 that he secured in the FY 2008 federal budget for a study that will lay the groundwork for the Allegheny Valley Commuter Rail.

Altmire secured \$500,000 in the FY 2008 budget for study on establishing rail service between Allegheny Valley and downtown Pittsburgh

(Oakmont, PA) – Today, U.S. Congressman Jason Altmire (PA-04) presented officials from the Allegheny County Economic Development with \$500,000 that he secured in the FY 2008 federal budget for a study that will lay the groundwork for the Allegheny Valley Commuter Rail. The transit project will provide passenger rail service to connect residents of Westmoreland County and the Allegheny-Kiski Valley with downtown Pittsburgh, and eventually the Pittsburgh International Airport.

As the only congressman from western Pennsylvania serving on the House Transportation and Infrastructure Committee, Congressman Altmire will be in a prime position to advocate for additional funding for the Allegheny Valley Commuter Rail when Congress reauthorizes the federal highway spending bill next year. The federal highway spending bill – currently known as SAFETEA-LU – lays out the federal government's transportation spending priorities for the next five years and is the single biggest source of funding for transportation projects nationwide.

“With record gas prices and increased congestion along Route 28, western Pennsylvania needs to direct more resources toward developing mass transit and in particular the Allegheny Valley Commuter Rail,” Altmire said. “The planning study we are talking about today is a step forward in getting the Allegheny Valley Commuter Rail up and running. As the only western Pennsylvanian on the House Transportation and Infrastructure Committee, I am going to work to ensure our region's transportation initiatives take high priority in the reauthorization of the federal highway bill next year so we can secure the funding needed to keep moving these projects forward.”

To speed up the commuter rail's development, local officials are currently focusing on establishing a “Starter System” that will provide passenger rail service between the Allegheny Valley and downtown Pittsburgh along existing Allegheny Valley railroad right-of-ways. The project is estimated to cost \$131 million and will average 1,900 riders each weekday.

EXHIBIT B
LOCATION AND MAP

At Pittsburgh

FT. WAYNE CONNECTING TRACK*

Jct. with Conemaugh M.L. - E. Side of Sandusky St. (Approx. M.P. 0.8) to

Jct. with Valley Ind. Track (Approx. M.P. 0.0)

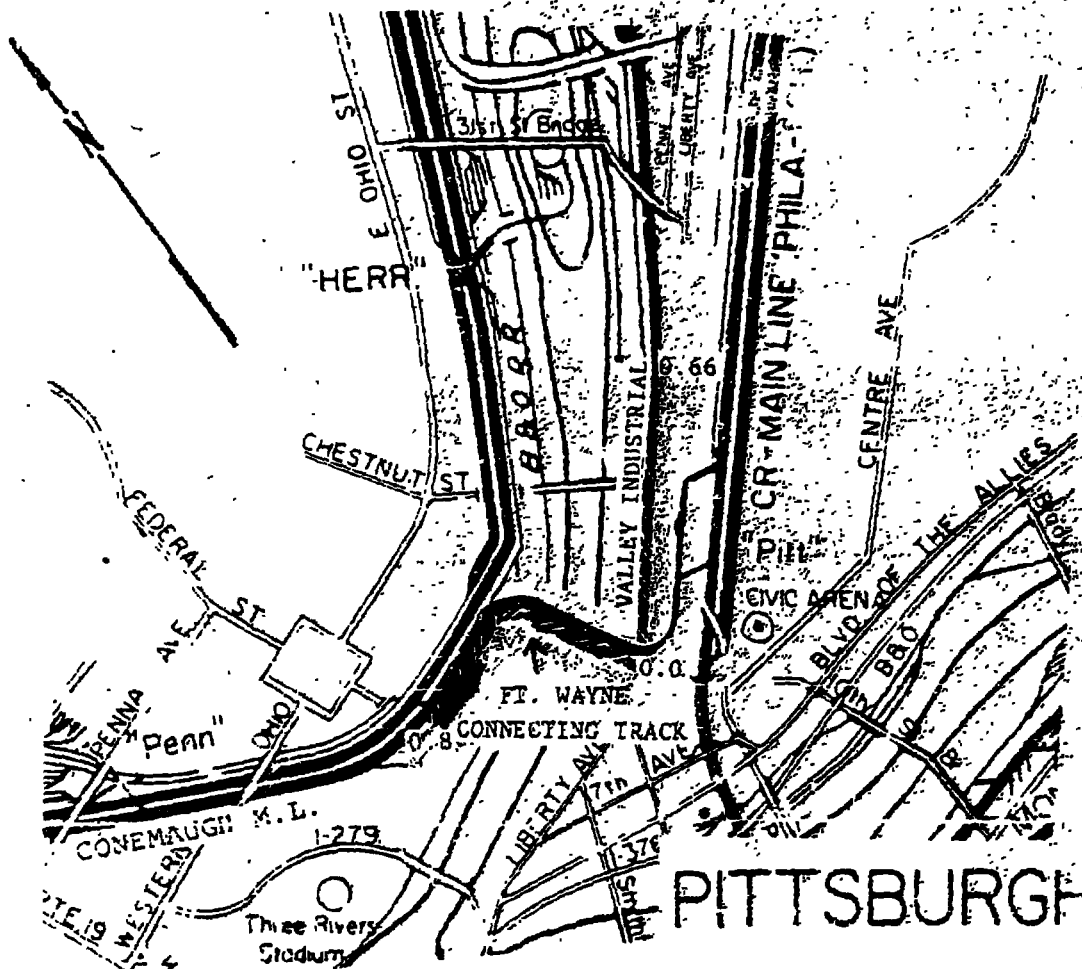
VALLEY INDUSTRIAL TRACK

(Formerly Allegheny Sec.)

Jct. with Ft. Wayne Conn. Trk (Approx. M.P. 0.0) to N. Side of 21st St. (Approx. M.P. 0.66)

State(s): Pa

Counties: Allegheny



* Including the lower level of the Fort Wayne Bridge.

PROPOSED ABANDONMENT

Consolidated Rail Corporation
Application for Abandonment

ICC Docket AB-167
Sub No. 558

EXHIBIT C

REVENUE AND COST DATA

FT. WAYNE CONNECTING TRACK

VALLEY INDUSTRIAL TRACK

Line No		Base Yr 1982	Est Sub 1982	Proj Sub 1984
1	Frt Rev Orig/Term _____ C/L's			
2	All Other Rev and Income			
3	Total Revenues Attributable			
4A	Maint. of Way & Structures	Former Overhead Route. No originating or terminating traffic during last 12 months.		
B	Maintenance of Equipment			
C	Transportation			
D	General Administration			
E	Freight Car Costs			
F	Revenue Taxes			
G	Property Taxes			
	Total On-Branch Costs			
5	Off Branch Costs			
6	Total Avoidable Costs			
	Subsidization Costs	////////////////		
7	Rehabilitation	////////////////		
8	Administrative Costs	////////////////		
9	Casualty Reserve Account	////////////////		
10	Total Subsidization Costs	////////////////		
	Return on Valuation	////////////////		
11A	Working Capital	////////////////		
B	Net Salvage Value	////////////////		
C	Estimated Value of Real Estate	////////////////		
	Total Valuation of Property	////////////////		
12	Rate of Return	////////////////		
13	Total Return on Value	////////////////		
14A	Avoidable Loss From Operations		////////////////	////////////////
B	Opportunity Costs		////////////////	////////////////
C	Total Avoidable Loss		////////////////	////////////////
15	Estimated Subsidy	////////////////		

VERIFICATION

COMMONWEALTH OF PENNSYLVANIA)

)

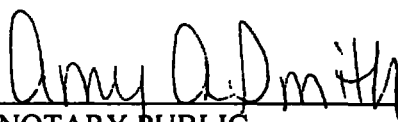
COUNTY OF ALLEGHENY)

I, Russell A. Peterson, Chief Executive Officer, Allegheny Valley Railroad Company,
swear or affirm and verify that the statements made in the foregoing Verified Statement
are true and accurate to the best of my knowledge, information and belief.

6-8 2009
DATE


SIGNATURE

Subscribed and sworn to before me this 8th day of
June 2009.


NOTARY PUBLIC

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Amy A. Smith, Notary Public
Oakmont Boro, Allegheny County
My Commission Expires April 15, 2011
Member, Pennsylvania Association of Notaries

III. LEGAL ARGUMENT

1. The Conrail abandonment application in AB167 (Sub No. 588N) (Respondent's Exhibit F) conclusively proves that Conrail did not seek abandonment authority for the Valley Industrial Track permanent rail easement extending from the line along Railroad Street between 21st and 16th Streets.

As noted in Mr. Peterson's Rebuttal Verified Statement, Exhibit B to Conrail's 1984 Abandonment Application confirms that Conrail did not seek ICC abandonment authority for the permanent rail easement. It depicts the Allegheny Branch trackage extending from the 31st Street Bridge south along the east bank of the Allegheny River to a track end point at approximately M.P. 0.6. Conrail's retained permanent easement continues from M.P. 0.6 (21st Street) to the 16th Street Bridge (See Peterson Exhibit D – yellow highlight). This trackage and the permanent rail easement are not part of the trackage for which Conrail sought abandonment authorization in AB-167 (Sub. No. 585N) which is identified by the cross hatched tape (highlighted in orange) for the Ft. Wayne Connecting Track (M.P. 0.8 to 0.0) and Valley Industrial (former Allegheny Secondary M.P. 0.0 to 0.66) along Smallman Street.

In Exhibit C of the Abandonment Application, Conrail also identified the Smallman Street line of the Valley Industrial Track as "Former Overhead Route. No originating or terminating traffic during the last 12 months." This further distinguishes the line Conrail abandoned in AB167-(Sub no. 588N) from the Valley Industrial Track segment extending along Railroad Street and onto the permanent rail easement (Track 8) which remained in operation by Conrail and AVRR specifically to originate and terminate traffic in the Pittsburgh Produce Terminal.

Thus the evidence in this proceeding demonstrates that neither Conrail nor AVRR have ever sought abandonment authorization for the disputed easement.

2. Even if the abandonment authorization obtained from the ICC in AB-167 (Sub. 558N) were construed to include the permanent easement, that authorization would have been permissive only and, the STB would have retained jurisdiction to decide whether Conrail consummated its abandonment authorization under the conditions imposed by the ICC in its Certificate and Decision of May 18, 1984.

Once a rail carrier abandons a line, the line is no longer part of the National Transportation System and the STB's jurisdiction terminates. Preseault v. ICC, 494 U.S.1, 5, n3, 8110 S.Ct. 914, (1990) In proceedings where the STB (ICC) imposes no conditions on an abandonment, the STB's decision to authorize the abandonment will end its jurisdiction over the line. Hayfield N.R.R. v. Chicago and N.W. Transp. Co., 467 U.S.622, 104 S.Ct. 2610 (1984); Lucas v. Township of Bethel, 319 F.3d 595, 602 (3d Cir. 2003); Friends of the Atglen-Susquehanna Trail, Inc. v. STB, 252 F.3d 246, 262 (3d Cir.) 2001.

In contrast, where abandonment authorization is conditional, the STB retains jurisdiction over a railroad right of way until it has been abandoned pursuant to the conditions imposed by the agency. Lucas, 319 F.3d at 603. In such cases, the agency also retains exclusive, plenary jurisdiction to determine whether there has been an abandonment sufficient to terminate its jurisdiction as well as what lines were or were not included in the abandonment application. A certificate of abandonment confers permissive authority on the railroad; and, until the railroad actually consummates an abandonment, none occurs and the Commission retains jurisdiction over the railroad's

right of way. Birt v. STB, 90 F.3d 580, 583 (D.C. Cir. 1996). Furthermore, the ICC has recognized that under §308(e)(3)(B) of NERSA Conrail was able to abandon or dispose of the line as it chose. Section 308 did not specify a time for issuance or effectiveness of an abandonment certificate following a Commission grant under §308(b). Conrail Abandonments under NERSA, 365 I.C.C. 472; 1981 WL 22704 (I.C.C.) Slip opinion at p. 8. Since, an ICC (and now Board) decision authorizing abandonment is not a compulsory order, but rather permissive authority, the railroad may or may not decide to exercise that authority. The railroad may, in fact, resume operations on a line that has been authorized for abandonment, and thereby retain that line in common carrier rail service without further approval from the agency. Abandonment and Discontinuance of Rail Lines, STB Ex Parte No. 537, 1996 WL 112617 (March 13, 1996). In Ex Parte No. 537, the Board summarized the history of its Notice of Consummation requirements:

Although the practice was never codified, until 1984 the ICC required a railroad to send the agency a letter confirming that it had consummated, or fully exercised, an abandonment within one year after the abandonment was authorized. Since then, some carriers have continued to send in these letters. Moreover, the courts have considered these letters in determining whether a line is still part of the Interstate Rail Network

The Board went on to explain that as this practice fell into disuse, its resources were increasingly devoted to determining whether or not a railroad's actions demonstrated an intent to consummate an abandonment. As a result, in 1996 the Board instituted formal regulations requiring the filing of a Notice of Consummation.

In the context of the 1984 Conrail abandonment in AB 167 (Sub. No. 558N) because §308 of NERSA did not specify when the abandonment became effective, the ICC imposed as part of its abandonment authorization decision a single requirement on Conrail: advise the Commission in writing of the date upon which the abandonment was

effectuated. As Buncher acknowledges in its Reply, there is no record in the Board's files that Conrail complied with this condition. If the permanent easement was included in the AB167 (Sub. No. 588N), there would be no way to confirm whether or not Conrail exercised or consummated its abandonment authorization with respect to the permanent easement between 16th and 21st Streets in the Strip District. Since there is no evidence of such confirmation, the Board would retain jurisdiction to determine whether the abandonment authorization granted to Conrail in AB-167 (Sub. No. 558N) was consummated and whether Conrail retained the permanent rail easement between 16th and 21st Streets subject to a continuing common carrier obligation. Thus, regardless of whether the permanent rail easement was subject to the ICC's May 18, 1984 order or not, the assertion by Buncher that the STB does not have jurisdiction over this dispute is without merit and must be rejected by the Board.

3. The evidence of record establishes that Conrail did not consummate any purported abandonment authorization for the Valley Industrial Track (former Allegheny Branch) permanent easement between 16th and 21st Streets.

The Board's jurisdiction to determine the abandonment issues in this proceeding is plenary, pervasive and exclusive of state law. Colorado v. United States, 271 U.S. 153, 164-65, 46 S. Ct. 452, 455 (1926); Kalo Brick and Tile, 450 U.S. at 311, 101 S. Ct. at 1124 (1981). Therefore, federal law would preempt state law on the question of abandonment and the extinguishment of this easement because the ICC retains full regulatory jurisdiction over the disputed right of way. Furthermore, even under Pennsylvania law, if Conrail did not consummate its abandonment authorization, it continued to retain its easement between 16th and 21st Streets for railroad purposes not

withstanding its service discontinuance in the absence of active shippers, because the permanent easement would continue to have been held by Conrail for railroad purposes.

None of Conrail's actions cited by Buncher, permanently terminated the ability of Conrail or its successors from utilizing the easement for future rail use. Indeed, in the absence of a written consummation notice, the only other clear and unequivocal affirmative act by which Conrail could have manifested an intent to permanently terminate its future easement rights would have been to convey or release its easement to Buncher. Cf. Thompson v. Railroad Preservation Society, 417 Pa. Super. 216; 612 A.2d 450 (1992). (A railroad quit claiming parcels of its right of way to adjacent land owners was an affirmative act from which a jury could conclude an intent to permanently abandon its right of way). In Buffalo Township v Jones, 571 Pa. 637, 813 A.2d 659 (2002), the Pennsylvania Supreme Court held that in order to establish the abandonment of a railroad easement, the evidence must show the railroad intended to give up its right to use the easement permanently and that such conduct must consist of some affirmative act on the part of the railroad which rendered the use of the rail easement impossible, or which imposed a permanent physical obstruction of the easement in a manner that was inconsistent with its further enjoyment. See also In Re: Condemnation by the County of Lancaster, ____ Pa. Cmwlth. Ct. ____, 909 A.2d 913 (Pa. Cmwlth. 2006).

Both the Board and reviewing courts, when considering whether a railroad has consummated an abandonment, look to the carrier's intent. Abandonment is characterized by an intention of the carrier to cease permanently or indefinitely all transportation service on the relevant line.... It is the "intent" of the railroad as evidence by a spectrum of facts varying as appropriate from case to case - that should be the

pivotal issue. Black v. ICC, 762 F.2d 106, 113n. 15 (D.C. Cir. 1985). The Commission has listed several concrete actions which may indicate an intent to abandon: cessation of operations, cancellation of tariffs, salvage of the track and track materials, and relinquishment of control over the right of way. Illinois Cent Gulf R.R. Co. – Abandonment – In DeWitt and Piatt Counties, Illinois, No. AB-43 (Sub No. 134), 1988 WL 235412 at 5 (December 19, 1998).

However these factors are equally consistent with the temporary cessation of operations, technically referred to as a discontinuance, which permits a railroad to cease rail operations but not to permanently relinquish its use of the railroad right of way for future railroad purposes. Accordingly, the Board often looks to additional behavior which signifies whether the railroad intended merely a discontinuance or a permanent cessation of rail operations and the surrender of its common carrier railroad obligation with respect to the line in question. Birt v. STB, 9 F.3d 580, 588 n.15 (D.C. Cir. 1996).

The primary indicia of Conrail's intent not to consummate its purported abandonment authorization in AB167 (Sub. No. 588N) with respect to the disputed rail easement would be found first and foremost in the reservation and grant of the permanent rail easement in the 1983 deed from Conrail to Buncher. It is uncontested that both Buncher and Conrail intended for the rail easement to be "permanent". Buncher asserts that this permanent easement was extinguished as a result of the issuance of the ICC's May 18, 1984 abandonment certificate and decision, Conrail's discontinuance of service, the removal of Track 8, and Conrail's nonuse of the right of way thereafter. Of course the ICC's order did not pertain to the track and right of way over the permanent easement, but even if it did, these assertions address only Conrail's nonuse of the

easement. Buncher chooses to disregard that a permanent rail easement gives the easement holder rights to future rail use of the easement in the absence of clear and unequivocal evidence of an intent to terminate future rail use of that easement. In the absence of evidence confirming that Conrail filed a letter of abandonment consummation with the Board, the actions of Conrail cited by Buncher as indicative of an intent to abandon this easement are equally indicative of an intent to discontinue service, but to retain the permanent rail easement for future rail use.

As the Board is well aware, railroads routinely remove, replace or reconfigure tracks on their rights of way to meet changing demands for rail service. Conrail's acquiescence to the removal or covering over of portions of the Valley Industrial Track 8 between 16th and 21st Streets merely reflected the discontinuance of current railroad use of that track but does not provide any evidence of an intent to permanently terminate rail service over that right of way. Buncher has cited no act by Conrail or AVRR that made the permanent rail easement between 16th and 21st Street impossible to use for future rail service. The decisions by the Board cited by AVRR in its Petition for Declaratory Order at §B, Pages 9-12 of its Legal Argument recognize that the removal or covering over of a railroad track is not a sufficient act to establish abandonment of a railroad right of way or to extinguish a permanent rail easement. The fact that Conrail did nothing to make the permanent rail easement impossible to use for railroad purposes confirms that Conrail did not consummate any purported abandonment authorization for the line between 16th and 21st Streets and continued to hold the permanent rail easement for future rail use when in 1995 it conveyed that easement to AVRR.

The ICC issued a decision and certificate of public convenience and necessity in AB167 (Sub. No. 588N) which authorized an abandonment but required Conrail to notify the Board in writing as to when that abandonment authorization became effective for all or part of that line of railroad. There is no evidence that Conrail complied with this requirement. Additionally, Conrail did not cancel its Pittsburgh Produce Terminal station listing in the Open and Prepay Station List Tariff which is the national tariff publication listing all stations at which railroad common carriers hold themselves out to provide rail service to the public. In 1984, Conrail permanently ceased operations between 16th and 21st Streets along its Smallman Street track (the former Allegheny Secondary). In 1983, it agreed that Buncher could acquire Tracks 6 and 7, but it retained a permanent rail easement for Track 8 as well as the right to renew or reconstruct that trackage in the future on its former Allegheny Branch trackage thereby preserving its only remaining line to serve the Pittsburgh Produce Terminal. Mere nonuse of a railroad right of way, no matter how long continued, cannot manifest an intention to abandon that right.

Thompson, supra at 454.

Although Buncher may have advised Conrail that it did not require rail service over the track between 16th and 21st Streets, that did not preclude the possibility that with future development of the Buncher parcels, new shippers might seek rail service that could be provided via Conrail's retained easement. In addition, neither Conrail nor AVRRI have permanently severed the easement between 16th and 21st Streets from the rest of the Valley Industrial Track (former Allegheny Branch), making future rail use of the easement impossible, nor did it seek Pa Public Utility Commission abolition of the 21st Street crossing. Based on these facts, it is evident that Conrail did not commit itself to

the abandonment of the Valley Industrial Track permanent rail easement between 16th and 21st Streets. Rather, it was keeping its options open, given that Buncher had only recently acquired the adjacent properties and that future development of these properties could involve new shippers that might want railroad service.

While the STB has noted that its practice of requiring a rail carrier to notify the Commission as to when an abandonment consummation occurred was ended in 1984, obviously the ICC had not dispensed with that requirement when it issued its May 18, 1984 order in AB-167 (Sub. No. 558N). In evaluating and assessing questions concerning consummation of abandonment, the Board has observed that the question of consummation is one of fact based upon an examination of the carrier's intent and it is not subject to determination by rigid formula. SSW Ry. Co. – Abandonment in Smith and Cherokee Counties, Texas, 9 I.C.C. 2d 406, 410 (1992). The Board has also stated that in determining the question of abandonment consummation it has followed a policy of asserting its jurisdiction as long as circumstances permit so that preservation of rail service can be authorized. T&P Railway – Abandonment Exemption – In Shawnee, Jefferson and Atchinson Counties, KS, Docket No. AB-381 (Sub. No. 1X), 1995 WL 424 909 (July 5, 1995). Given Conrail's failure to file a written consummation notice with the ICC as directed by its May 18, 1984 Certificate and Decision, and whether or not the permanent rail easement was encompassed within AB-167(Sub No. 588N), it would be appropriate and proper for the STB to construe the facts and circumstances established by the evidence in this proceeding in a manner that will further the National Transportation Policy of preserving rail service to the public. 49 U.S.C. §10101(4).

4. The 1983 deed from Conrail to Buncher must be construed to provide an easement consistent with the purposes for which the easement was reserved by Conrail.

The basis for AVRR's interpretation of the easement retained by Conrail in the 1983 deed to Buncher is clearly set forth in Mr. Peterson's prior verified statement. Buncher argues that the language of this reservation should be construed, at most, to reserve a 36 foot wide easement for railroad purposes. While the deed language describing the width of the rail easement is less than precise; a 36-foot wide easement would be totally inconsistent with the standard width of railroad rights of way and would permit encroaching occupancies on either side of the right of way with barely adequate clearances for rail operations. It would also preclude adequate right of way width to elevate or depress the rail line, rights which Conrail specifically reserved in the 1983 deed. Moreover, the rail operations conducted by Conrail along the Valley Industrial Track between 16th and 21st Streets were historically transloading activities where railroad cars were brought onto the track and trucks were driven up on either side of the railroad cars to be loaded or unloaded with produce. Thus, the 18 foot no build zone and the 12 foot no work or occupancy zone were not intended to overlap and must be measured from both sides of the center line of the right of way. This would provide a standard 60 foot wide railroad right of way. Moreover, the nonexclusive access rights to the balance of the 90 foot wide permanent rail easement recognize that future rail service requirements might involve installation of some other configuration of tracks required to serve future shippers or other rail users. Finally, a 90 foot right of way is depicted on the strip map attached as an exhibit to the 1995 deed from Conrail to AVRR.

Accordingly, the Board has exclusive and plenary jurisdiction to construe the terms of the easement retained in the 1983 Buncher deed so as to enable AVRR to fulfill its railroad common carrier obligations which continue to attach to this line segment.

5. The Board's Effingham decision is not restricted solely to industrial park rail operations nor is it inapplicable to a "series of contiguous rail line segments."

In an effort to bolster its jurisdictional arguments, Buncher attempts to distinguish Effingham by arguing that this decision applies only to railroad tracks within an industrial park which constitute an entire system. That attempt to limit Effingham is unsupported by STB decisions. For example in Honey Creek Railroad, Inc. – Petition for Declaratory Order, STB Finance Docket No. 34869, the Board cited Effingham for the proposition that a railroad needs STB authority to acquire a rail line and Board authorization to abandon it. The line in question was a 5.9 mile section of a former Conrail line between Sulphur Springs and New Castle, Indiana. See also Kaw River Railroad, Inc. – Acquisition and Operation Exemption – The Kansas City Southern Railway Company, Finance Docket 34509 (May 3, 2005). Moreover, the attempt by Buncher to mischaracterize the AVRR acquisitions of the Valley Industrial Track from Conrail is simply without justification. The tracks comprising of Valley Industrial Track, particularly the western most end of that track between 16th and 21st Streets, were clearly set forth in the AVRR acquisition exemption proceeding and Buncher may not now collaterally attack the ICC's exercise of its jurisdiction over this line fourteen years after the fact. Cf. Montana Rail Line, Inc. – Acquisition and Operation Exemption – Certain Lines of Burlington Northern Railroad Company, Finance Docket 31089, 1988 WL 225129 (Nov. 17, 1988).

6. A holding out of common carrier rail service is determined by the railroad's certificate of public convenience and necessity, its tariff publications and the property rights owned by the railroad on which it has or may construct rail facilities to serve existing or future customers.

A railroad common carrier is one that holds itself out to provide common carrier railroad service to the public and it is the right of the public to demand service in accordance with that withholding out which is the criterion that determines a common carrier. U.S. v. Louisiana & P.R. Co., 234 U.S.1, 34 S. Ct. 741 (1914). The holding out of rail service by a railroad is accomplished by means of the publication of railroad tariffs which most carriers now post on their websites. This holding out of published public rates is one of the means by which common carrier railroads comply with the provisions of 49 U.S.C. §11101. Of course, common carrier railroads can only hold themselves out to provide rail service where they have the requisite property on which to construct rail lines to serve existing or future customers.

AVRR is presently serving customers located in the Pittsburgh Produce Terminal from the Valley Industrial Track adjacent to and immediately east of 21st Street. However, were additional rail traffic to develop in the vicinity of the Pittsburgh Produce Terminal, AVRR contends that it has both the requisite property interests available between 16th and 21st Streets, comprising the permanent rail easement retained by Conrail over the Buncher property in 1983 and conveyed to AVRR in 1995, which could be used to reconstruct railroad tracks to accommodate new passengers or increased shipper transloading requirements. No actions have been taken by Conrail or AVRR to render this permanent easement impossible to use for rail purposes. The Board has long

recognized that railroads may appropriately tailor common carrier railroad service to both existing and future shippers. Southwest Gulf Railroad Company – Construction and Operation Exemption – Medina County, Texas, STB Finance Docket No. 34284, (May 9, 2003). In the offering of such common carrier rail service, a railroad is not restricted to its existing rail facilities but may reconfigure and expand its tracks, build new rail facilities and adjust its rail facilities to market requirements. A railroad may acquire additional property for these purposes, and in many states, including Pennsylvania, railroads can exercise condemnation authority if necessary to acquire property where such acquisitions are for a public purpose.

As explained by Mr. Peterson, it has not as yet been necessary for AVRR to exercise its rights to provide common carrier service over its rail easement but given the prospects for reestablishing passenger service along the AVRR line between New Kensington and downtown Pittsburgh, it is becoming increasingly evident that there is substantial public interest in reinstituting passenger rail service and ancillary freight operations over the rail easement to which the Buncher property is subject. The lines of railroad acquired by AVRR from Conrail in 1995 clearly identify the permanent rail easement over the Buncher parcel between 16th and 21st Streets. AVRR should be able to utilize that easement to respond to the new passenger rail service requirements which have been identified by local governmental agencies.

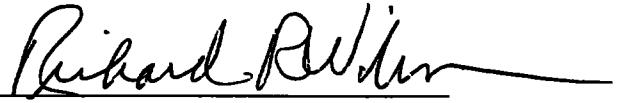
IV. CONCLUSION

AVRR therefore, respectfully requests that the Board issue a Declaratory Order granting the relief sought in its Petition for Declaratory Order so that AVRR can

reinstitute common carrier rail service between 16th and 21st Streets in the Pittsburgh Strip District.

Respectfully submitted,

RICHARD R. WILSON, P.C.

By: 

Richard R. Wilson, Esq.
Attorney for Allegheny Valley Railroad
Company

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(814) 419-8152

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of June, 2009 served a copy of Allegheny Valley Railroad Company's Rebuttal to the Reply of The Buncher Company upon the following by first class United States Mail, postage prepaid:

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